RECORD AND I BRIEFS

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IN THE
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, EX REL.
CORI RIGSBY; KERRI RIGSBY,
Respondents.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the Nation's business community, including cases involving the False Claims Act ("FCA").

The Financial Services Roundtable ("FSR") represents 100 of the largest integrated financial services companies providing banking, insurance investment products, and services to the American consumer. Member companies participate through the Chief Executive Office ("CEO") and other senior executives nominated by the CEO. FSR member companies account directly for $92.7 trillion in man-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and their letters consenting to its filing have been filed with the Clerk.

aged assets, $1.2 trillion in revenue, and 2.3 million jobs.

Amici's members are common targets of private *qui tam* actions under the FCA. Even when the underlying allegations are meritless, *amici*'s members are exposed to serious reputational harms and the pressure to settle. *Amici* have substantial interests in ensuring that the FCA's seal requirement is appropriately enforced in a manner that vindicates congressional interests and protects defendants from undue reputational injury. They also have an interest in ensuring that defendants are protected from overly broad approaches to the *scienter* element of an FCA claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question in this case is whether the first review of a *qui tam* complaint will take place in the halls of government or across websites and television screens. Should the federal government be allowed to control the pace and publicity of any investigation? Or should a private relator be free to go to the press with inflammatory allegations immediately upon filing a complaint, leveraging the power of the Internet and the nightly news in aid of securing a settlement?

Congress chose the former, requiring *qui tam* complaints to be filed under seal. But the Fifth and Ninth Circuits have in effect allowed private relators to nullify that choice. If a relator perceives a litigation advantage in turning to the media, he or she can disregard Congress's express instructions with little

fear of adverse consequences in those circuits. Other courts have imposed meaningful constraints on private enforcers of the False Claims Act, recognizing in particular the reputational consequences to defendants when relators defy the statute that authorizes their suit. *Qui tam* complaints should trigger sober government review; they should not trigger reputational attacks inflicting harms that cannot be undone, even if claims of fraud ultimately prove baseless.

I. The judicial system has seen a significant increase in FCA lawsuits by private relators. The Government does not intervene in a large percentage of these cases, which frequently lack merit. There is nonetheless a significant incentive for relators to bring even weak FCA claims because of the settlement pressure they may create. In particular, the reputational harms an allegation of fraud may inflict on a defendant can create an impetus to settle even unmeritorious claims. Relators have added incentives to pursue such claims as a consequence of the FCA's remedial regime, which has given rise to staggering statutory penalty claims that may have little relation to the defendant's actual degree of culpability.

Injury to the reputation of a defendant accused of fraud is a significant problem in FCA cases, one that courts have recognized in enforcing the heightened pleading requirement of the Federal Rules. This issue is equally relevant to the FCA's seal requirement. As two courts of appeals have recognized, the legitimate reputational interests of a defendant must be taken into account in determining

the sanction for a relator's violation of the seal. Another court of appeals has noted the most troubling implication of a standard that under-enforces the seal requirement: relators may be able to obtain a litigation advantage by turning to the media at the earliest opportunity, and the statutory prohibition on doing so would not serve as a deterrent.

The decision below adopts a "balancing test" that is in fact weighted heavily against enforcing the seal requirement. The Fifth and Ninth Circuits' test focuses principally on "actual harm" to the Government, something the Government itself has recognized will often be difficult to discern at the relevant time. That standard also explicitly rejects consideration of reputational concerns, which other courts correctly recognize as an important function of the seal requirement.

II. The proper standard for corporate *scienter* under the FCA is also an important issue for the business community. As this Court has noted, the courts of appeals have taken divergent views on this question. However, courts generally have rejected "collective knowledge" theories of *scienter*, under which innocent pieces of knowledge of different employees are combined to find that an organization as a whole "knowingly" presented a false claim.

Courts should not allow liability based solely on generalized knowledge of a scheme at the management level, even where the only employees with knowledge of the specific claim in question share an honest belief that the claim is *not* false. Such a relaxed approach to *scienter* adds to a worrying

enforcement trend that shifts the focus of the False Claims Act away from the actual claim in question, leading to settlements that do not distinguish between knowingly false claims and claims that an employee with the relevant knowledge submits in good faith.

More broadly, "collective knowledge" theories risk converting the FCA into what is in effect a strict liability regime. Strict enforcement of *scienter* is especially critical as the Government and relators pursue expansive theories of liability (*e.g.*, liability for "implied certification") coupled with staggering claims for statutory penalties. Relaxing the *scienter* requirement presents a significant issue that threatens to undo an important protection against abuse of the FCA.

ARGUMENT

I. The Remedy For Violations Of The FCA's Seal Requirement Is An Important Issue.

The False Claims Act empowers individuals to bring lawsuits "in the name of the Government." 31 U.S.C. § 3730(b)(1). Unsurprisingly, Congress did not delegate this significant law enforcement power to private actors free of limitations. One important qualification on this private cause of action concerns the relator's respect for the secrecy of FCA investigations. In the same subsection of the statute that creates the right to sue, Congress mandated that a complaint "*shall* remain under seal for at least 60 days." *Id.* § 3730(b)(2) (emphasis added).

If "shall" is to mean "shall," then compliance with a precondition to suit under the FCA cannot be lightly disregarded. Yet under the approach taken in the decision below, relators can violate the law without consequence in most cases. Such a rule provides an ineffective deterrent to relators weighing the potential advantage of "exposing a defendant to immediate and hostile media coverage," which "might provide a plaintiff with the leverage to demand that a defendant come to terms quickly." *United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 298 (6th Cir. 2010).

This issue is worthy of plenary review, as the Solicitor General has previously recognized. *See* Pet. 14-19; Br. for the United States as Amicus Curiae at 7, *United States ex rel. Summers v. LHC Grp., Inc.*, No. 10-827 (U.S. 2011). Review is especially urgent in light of the ongoing boom in *qui tam* litigation and the potential havoc from a regime that allows relators to break the law as a litigation tactic. Under the approach adopted by the Fifth Circuit, no weight is given to the legitimate interest of businesses not to be publicly tarred with allegations, even unmeritorious ones, to drive up the settlement value of a case.

1. In recent years the judicial system has experienced a massive increase in the filing of FCA lawsuits by private relators. By 2014, the number of *qui tam* lawsuits had increased to more than 700 filed per year. U.S. Dep't of Justice, Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2014 (Nov. 20, 2014) ("DOJ Fraud Statistics"), http://tinyurl.com/2014FCAStats. The past two years have been the most litigious on record. *Id.* As

the Justice Department put it at the end of 2013, private FCA litigation has "soared," with "nearly half the total recoveries since the Act was amended" in 1986 coming over the preceding four years. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), http://tinyurl.com/FCASoars.

The Government intervenes in under a quarter of these cases. Press Release, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), http://tinyurl.com/DeleryFCA; U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63 (Oct. 2013), http://tinyurl.com/LawsuitEcosystem. The remainder usually lack merit. *See* DOJ Fraud Statistics, *supra*; David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013).

Yet even where there is no meritorious claim, FCA litigation can exert a strong *in terrorem* effect. Relators can extract settlements from defendants averse to high discovery costs, the risk of large losses, and—of particular note in this case—reputational harms. One scholar of *qui tam* litigation has noted that "indifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements

when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012).

The incentive to pursue even weak claims is especially strong in light of the enormous damages relators often seek. The FCA provides for treble damages *and* a statutory penalty of between $5,500 and $11,000 for each false claim. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9). Due to the breadth of many government contracts, the number of distinct claims—and thus the overall penalty amount—may exponentially outpace any fair punishment for the alleged underlying scheme. One court of appeals, for example, adds a penalty for each invoice submitted by a contractor, resulting in what that court itself calls a "monster" imposing multi-million dollar liability. *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 407 (4th Cir. 2013), *cert. denied*, 135 S. Ct. 83 (2014). Companies may be pressured to settle claims simply because of how the FCA has been applied to escalate fines in a way that is unmoored from culpability. This dynamic only increases the incentive a relator may have to file even a weak complaint, in particular one the defendant would be eager to settle quickly to spare its reputation. Strict enforcement of the FCA's seal requirement plays an important role in reducing the *in terrorem* effect that weak claims can exert.

2. Claims of fraud can be easy to level but difficult to rebut. Thus, one of the functions of the

heightened pleading requirement for cases of fraud is to "protect defendants whose reputation may be harmed by meritless claims of fraud." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996). As Judge Posner has noted, "public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual)." *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999). The concerns with "'protect[ing] defendants from harm to their goodwill and reputation'" are "as applicable in cases brought under the [False Claims] Act as they are in other fraud cases." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)), *cert. denied*, 134 S. Ct. 1759 (2014); *see also United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1316 (11th Cir. 2002) (noting the risk of "undeserved harm to [FCA defendants'] goodwill and reputation").

Two courts of appeals have properly recognized that an important function of the FCA's seal requirement is to provide protection to defendants from reputational harms. *See Smith v. Clark/Smoot/Russell*, 796 F.3d 424 (4th Cir. 2015); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995). For example, the Fourth Circuit has stated that one of the "purposes" of the "seal provision" is "to protect the reputation of a defendant in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene." *Smith*, 796 F.3d at 430 (citation and internal quotation marks omitted).

The Second Circuit also has noted that "a defendant's reputation is protected to some degree when a meritless *qui tam* action is filed [and the seal requirement is respected], because the public will know that the government had an opportunity to review the claims but elected not to pursue them." *Pilon*, 60 F.3d at 999. The court also explained that the reputational consequences of the seal requirement can complement the Government's interests. While defendants have especially strong interests in avoiding publicity from baseless allegations, in cases of a "potentially meritorious complaint" "a defendant may be willing to reach a speedy and valuable settlement with the government in order to avoid the unsealing." *Id.*

One of the most troubling aspects of a relaxed approach to the seal requirement is that it may incentivize a litigation strategy of *intentionally* breaking the rules in order to inflict reputational damage. At a minimum, it allows a plaintiff to threaten to break the rules as a negotiating tactic to increase the pressure on the defendant to settle. As the Sixth Circuit noted, in some cases "hostile media coverage might provide a plaintiff with the leverage to demand that a defendant come to terms quickly." *Summers*, 623 F.3d at 298.[2] While the present case

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[2] The Sixth Circuit minimized the importance of reputational consequences in the statutory scheme, based solely on the lack of an express discussion of it in the legislative history. *Summers*, 623 F.3d at 293 n.4. Despite this error, the court adopted an approach that gives full effect to the seal requirement and vindicates all of its purposes, including the reputational interests it protects.

did not settle, the underlying facts are a prime example of relators willfully appealing to the court of public opinion while a seal was in place. *See* Pet. 9-11. In cases like this one, a defendant's reputational injury may be more than collateral damage—it may be the *reason* the relator decides to break the rules.

3. In the decision below, the Fifth Circuit joined the Ninth Circuit in adopting a so-called "balancing test" for determining when to dismiss a claim for violation of the seal requirement. Pet. App. 20a; *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995). But in reality the balance is heavily weighted to one side. The primary factor for both the Fifth and Ninth Circuits is whether the defendant can prove that "the Government was *actually* harmed" by the specific disclosure. *Lujan*, 67 F.3d at 245 (emphasis added). In this case, for example, the court of appeals conceded that the lack of proof of actual harm made the blatant "bad faith" of relators' counsel immaterial. Pet. App. 23a.

This "actual harm" standard, as applied by the Fifth and Ninth Circuits, might rarely be satisfied. It may be difficult for any defendant to prove that the Government was actually harmed—something the Government itself might not know, at least at the relevant time. In many cases, the Government cannot say any more than what it said in *Lujan*: it could "not claim[] in this case that it was prejudiced," but also that it was "not in a position to state[,] as a factual matter, that it was *not* prejudiced." *Lujan*, 67 F.3d at 246 (quoting Statement of Interest of the United States Regarding Defendant's Motion to Dis-

miss the Complaint) (emphasis added). Many cases are likely to reside in this gray area, and the court of appeals' solution is to dramatically under-enforce the seal requirement in these cases. *See Summers*, 623 F.3d at 298 (noting that "the rules are in place precisely because Congress understood" that "the extent to which the Government might be harmed by disclosure is impossible to evaluate *a priori*").

In addition to placing too much weight on the actual harm to the Government, the "balancing test" applied by the Fifth and Ninth Circuits is problematic because it overlooks the reputational harm to defendants. Based solely on inferences from a Senate Committee report, the Ninth Circuit concluded that "protecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision." *Lujan*, 67 F.3d at 247. The Second and Fourth Circuits have expressly rejected this view, holding instead that an appropriate remedy for a seal violation should account for the reputational consequences of the violation. *See Pilon*, 60 F.3d at 999; *Smith*, 796 F.3d at 430. That is the correct approach. Whatever the merits of looking to legislative history to interpret ambiguous text, the omission of a particular interest from a committee report does not give courts license to ignore that interest in deciding whether to enforce a plainly written statutory requirement.

In sum, undue reputational harm is a recognized concern in FCA litigation, and violations of the seal provision can inflict such harm—sometimes by design. Defendants' legitimate interests should not

be ignored so that relators are free (and even incentivized) to violate their statutory obligations and advance their agendas through the media.

II. The Standard For Corporate *Scienter* Under The FCA Is An Important Issue.

Another important concern in FCA litigation is what it means for a corporation to "*knowingly* present[] . . . a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A) (emphasis added). As this Court has recognized, the courts of appeals have adopted differing approaches to this issue. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011). Under one view, the "knowledge" of one employee cannot be combined with the unknowing actions of another to conclude that a company has knowingly presented a false claim. *See id.* (citing *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1273-76 (D.C. Cir. 2010). Other courts are willing to overlook the absence of any "single employee" with knowledge of both underlying misconduct and a certification requirement. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 919 (4th Cir. 2003).

Both the D.C. Circuit and the Fourth Circuit properly reject the "collective knowledge" theory. Both courts agree that a plaintiff may not "prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds." *Harrison*, 352 F.3d at 918 n.9; *Sci. Applications Int'l Corp.*, 626

F.3d at 1274 ("We . . . believe that under the FCA, 'collective knowledge' provides an inappropriate basis for proof of scienter because it effectively imposes liability, complete with treble damages and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act's language, structure, and purpose.").

Under the Fifth Circuit's approach to the issue, knowledge of a claim's falsity can be imputed to the corporation even though the actual employees responsible for the claim "shared a good faith belief" that it was proper. Pet. App. 37a. Put differently, a defendant can be held responsible for "knowingly presenting a false claim" when the only employees with actual knowledge of the claim diligently investigated it and honestly believed that it was *not* false.

Such a relaxed approach to *scienter* contributes to a worrying trend of treating the False Claims Act as a broad regulatory tool that is untethered to the actual "false claims" that are the statute's focus. *See United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002) ("The False Claims Act . . . focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme."). The Government, for example, has increasingly pursued far-reaching theories of FCA liability that minimize the need to prove whether the actual claims in question were known to be false by the employees who actually evaluated them. *See, e.g., United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, No. 1:08-cv-251, Order, Dkt. No. 136, at 31 (E.D. Tenn. Sept. 29, 2014) (noting the Government's

theory of implying the knowing submission of false claims based on general "corporate practices"); *United States v. Quicken Loans Inc.*, No. 15-0613, Complaint, Dkt. No. 1 (D.D.C. Apr. 23, 2015) (one of several FCA claims against companies that underwrite home loans backed by the Federal Housing Administration based on general corporate practices, without focus on whether individual underwriters had a good faith belief their decisions were correct).

More broadly, expansive views of *scienter* risk breathing new life into the "collective knowledge" theory that the Fourth and D.C. Circuits have correctly rejected. That theory turns a statute intended to punish knowing misconduct into what is in effect a strict liability regime: if a false claim is in fact presented, innocent bits of knowledge from across a large organization can readily be stitched together. The result is that a claim can be "knowingly false" without a single individual behaving dishonestly.

Such an approach exposes companies to staggering liability even when none of its employees knowingly engaged in any wrongdoing. This result is particularly troubling given the shift in focus of FCA litigation from the more traditional frauds the Act was designed to address, to more exotic theories of "implied certification" of regulatory compliance. *Sci. Applications Int'l Corp.*, 626 F.3d at 1270. Courts have recognized that these theories are "prone to abuse by the government and *qui tam* relators who, seeking to take advantage of the FCA's generous remedial scheme, may attempt to turn the violation of minor contractual provisions into an FCA action."

Id.; *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir. 2015) (same).

This prospect for "abuse" plays out not only in actual litigation, but also in government investigations that never see a courtroom. The threatened penalties can bankrupt a company if claims are not settled. One important way of addressing these "very real concern[s]" has been "strict enforcement of the Act's materiality and *scienter* requirements." *Sci. Applications Int'l Corp.*, 626 F.3d at 1270; *Triple Canopy*, 775 F.3d at 637. But if courts eschew "strict enforcement" of the FCA's *scienter* requirement, the result would be to expose defendants to expansive and unwarranted liabilities and added settlement pressure to resolve even weak claims.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to address the issues presented in the petition.

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